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"The democratic integrity of law . . . depends entirely upon the degree to which its processes are legitimate."[1]

"To no one will We sell, to none will We deny or delay, right or justice."[2]

INTRODUCTION

This Comment takes a conservative constitutional theory and argues for what some would consider to be a very liberal proposition: a right of access to the courts for all citizens regardless of ability to pay. At first blush, it might seem absurd to suggest that a right to court access irrespective of economic status is consistent with the original intent of the framers of the Constitution. However, the idea that justice should not be rationed on the basis of ability to pay is not a new one, as the quotation from the Magna Carta, chapter 40, illustrates.[3]

Robert Bork's theory of original understanding has been attacked as producing a rigid and mechanical jurisprudence.[4] Others have contended that the theory is simply a pretense used by conservative judges to impose their political agendas.[5] Examination of Bork's theory, however, reveals that it does not necessarily favor either conservative or liberal thought.[6] Nor does it produce simply rigid legal doctrine, frozen in the late 1700s.

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1. R. BORK, THE TEMPTING OF AMERICA 2 (1990).

2. Magna Carta, 1215, 16 John, ch. 40.

3. Another illustration of the long-standing recognition of the need for universal access to the courts is a statute promulgated in 1495 by Henry VII providing "that the judge should appoint counsel for the poor in civil suits." Weinstien, *The Poor's Right to Equal Access to the Courts,* 13 CONN. L. REV. 651, 658 (1981) (citation omitted).

4. *See, e.g.,* Chemerinsky, *The Constitution Is Not "Hard Law": The Bork Rejection and the Future of Constitutional Law,* 6 CONST. COMM. 29 (1989). For a series of essays criticizing Bork's jurisprudence, see *The Bork Nomination,* 9 CARDOZO L. REV. 1 (1989).

5. Dworkin, *The Forum of Principle,* 56 N.Y.U. L. REV. 469, 470 (1981).

6. Bork himself rejects this criticism: "[t]he philosophy of original understanding means that the ratifiers of the Constitution and today's legislators make the political decisions, and the courts do their best to implement them. That is not a conservative philosophy or a liberal philosophy; it is merely the design of the American Republic." R. BORK, *supra* note 1, at 177.

According to Bork, evolving legal doctrine does not unsettle the originalist.[7] In fact, it is both desirable and inevitable. The role of the originalist judge is "to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[8]

In view of this context, derivation of a constitutional right of court access might be possible. Furthermore, considering the evolution of the judicial process, including an increasingly complex body of procedural law and an overwhelming reliance on attorneys, an indigent's right to counsel and to other legal services would be a logical application of such a right of access in today's world.

Part I of this Comment outlines Robert Bork's theory of original understanding. Part II uses that theory to derive, from both the due process clauses and the structure of the Constitution, a right to "neutral access" to the courts for all citizens. Part III then demonstrates that the right to neutral access requires that indigents be provided with legal services in civil proceedings.[9]

I. ROBERT BORK'S THEORY OF ORIGINAL UNDERSTANDING

A. The Madisonian Dilemma

According to Bork, the primary function of the federal judiciary is to resolve the "Madisonian dilemma."[10] "The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority."[11] The authority to reconcile these principles of majority power and minority freedom has been "[p]laced . . . in a nonpolitical institution, the federal judiciary, and thus, ultimately, in the Supreme Court" of the United States.[12]

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7. R. BORK, *supra* note 1, at 168-69 (quoting Ollman v. Evans, 750 F.2d 970, 973 (D.C. Cir. 1984) (en banc) (Bork, J., concurring)).

8. *Id.* at 168 (quoting *Ollman,* 750 F.2d at 973 (Bork, J., concurring)).

9. The arguments in this Comment are applicable to both civil and criminal proceedings. However, since the Supreme Court already recognizes an indigent's right to court-appointed counsel in criminal proceedings, *see, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963), this Comment will focus exclusively on the need for a right to counsel and other legal services in civil proceedings.

10. R. BORK, *supra* note 1, at 139.

11. Bork, *The Constitution, Original Intent, and Economic Rights,* 23 SAN DIEGO L. REV. 823, 824 (1986).

12. R. BORK, *supra* note 1, at 139. While resolution of the Madisonian dilemma is the central function of the courts, Bork recognizes other functions as well.

> There is, of course, more to the Court's constitutional function than defining in so direct a fashion the rights of the individual against the state. There is the related task of maintaining the system of government the Constitution creates.

Proper exercise of this authority requires that the Court's decisions rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved."[13] The legitimate exercise of the Court's power is dependent upon its ability to

> demonstrate in reasoned opinions that it has a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power.[14]

Thus, the Court must act on principles outside its own value choices; that is, it "must not be merely a 'naked power organ.'"[15]

B. The Constitution as Law: Neutral Principles

Under Bork's theory the Constitution is to be interpreted as law in much the same way a judge would interpret a statute, a contract, a will, or the opinion of a court. This is not to say that a judge should not take into account the differences in various legal materials.[16] But, these differences aside, "the judge is to interpret what is in the text and not something else."[17]

Bork's concept of neutral principles logically follows from the premise that the Constitution is law. Bork borrows the term "neutral principles"

> The Court must often discern the powers of Congress and those of the President when the claims of each come into conflict, as, it appears, they increasingly do. Similarly, though the Court has largely abandoned the role, there is the job of defining the respective spheres of national and state authority. These questions of governmental structure, competence, and authority are, of course, closely related to the resolution of the Madisonian dilemma and may in fact amount to much the same thing.

Id. at 140.

13. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2 (1971) (footnote omitted) (quoting H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 27 (1961)).

14. *Id.* at 3.

15. *Id.* at 2 (footnote omitted); *see also* H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3, 27 (1961) (discussion of need for principled court decisions reached with reasons that are neutral and general).

16. As Bork writes:

> To be sure, there are differences in the way we deal with different legal materials, which was the point of John Marshall's observation in *McCulloch v. Maryland* that "we must never forget, that it is *a constitution* we are expounding." By that he meant that narrow, legalistic reasoning was not to be applied to the document's broad provisions, a document that could not, by its nature and uses, "partake of the prolixity of a legal code."

R. BORK, *supra* note 1, at 145 (footnote omitted) (emphasis in original).

17. *Id.*

from Professor Herbert Wechsler.[18] Wechsler spoke of the neutral application of principle. Bork builds on this concept, calling also for the neutral derivation and definition of principles. Under Bork's theory a judge must neutrally derive, define, and apply legal principles.[19] The neutral derivation and definition of legal principles requires that constitutional principles be based on the public's understanding of the text and design of the Constitution at the time it was enacted. The neutral application of principles requires that the judge be willing to apply a given principle in the same way to two cases that he cannot honestly distinguish.

1. The Neutral Derivation and Definition of Principles

According to Bork there are two methods for deriving principles from the Constitution. "The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules."[20] Bork calls these "specified rights" since they are derived directly from the text and history of the Constitution.[21] "The second method derives rights from governmental processes established by the Constitution."[22] These "secondary rights" are derived from the guarantee clause[23] since they exist to guarantee citizens a republican form of government. To derive secondary rights the judge should examine the provisions and structure of the Constitution along with the political history of the United States.[24] The principles are "derived from the requirements of our form of government."[25]

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18. H. WECHSLER, *supra* note 15, at 27, *quoted in* Bork, *supra* note 16, at 2.

19. Bork, *supra* note 16, at 23. *See generally* R. BORK, *supra* note 1 (The domination of politics in the law diminishes the democratic integrity of the law.).

20. Bork, *supra* note 13, at 17.

21. *Id.*

22. *Id.*

23. "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4; *see* Bork, *supra* note 16, at 19 (discussing derivation).

24. Bork, *supra* note 13, at 19.

> Whether one chooses to use the guarantee of a republican form of government of article IV, § 4 as a peg or to proceed directly to considerations of constitutional structure and political practice probably makes little difference. Madison's writing on the republican form of government specified by the guarantee clause suggests that representative democracy may properly take many forms, so long as the forms do not become "aristocratic or monarchical."

Id.; see also Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 ("[I]nterpretation according the Constitution's structure and function. . . . is the judicial method of *McCulloch v. Maryland* . . . ."(footnote omitted)). For an analysis of this approach, see C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

25. Bork, *supra* note 13, at 19.

Once a principle has been derived from the Constitution, it must be neutrally defined.[26] The breadth or level of generality of the principle must be consistent with the intent of the ratifiers. A judge should state the principle at the level of generality "that interpretation of the words, structure, and history of the Constitution fairly support[]."[27] The proper definition of a specified right requires an accurate analysis of the text and constitutional history.[28] In contrast, the proper definition of a secondary right requires an analysis of whether the right is needed to preserve the "Madisonian" governmental process.[29]

2. The Neutral Application of Principles

Once a principle has been properly derived and defined it must be neutrally applied. This requires that the judge "'sincerely believe in the principle upon which he purports to rest his decision.' 'The judge' . . . 'must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish.'"[30] The judge must apply the principle "consistently and without regard to his sympathy or lack of sympathy with the parties before him."[31]

This neutral application of principle does not, however, mean "that the judge will never change the principle he has derived and defined."[32]

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26. R. BORK, *supra* note 1, at 147 (footnote omitted):

> The Constitution states its principles in majestic generalities that we know cannot be taken as sweepingly as the words alone might suggest. The first amendment states that "Congress shall make no law . . . abridging the freedom of speech," but no one has ever supposed that Congress could not make some speech unlawful or that it could not make all speech illegal in certain places, at certain times, and under certain circumstances.

27. *Id.* at 150.

28. For an illustration of defining a specified right under the equal protection clause, see *id.* at 149-50.

29. Secondary rights are derived and defined based on their utility in preserving the Madisonian system:

> Secondary or derivative rights are not possessed by the individual because the Constitution has made a value choice about individuals. Neither are they possessed because the Supreme Court thinks them fundamental to all humans. Rather, these rights are located in the individual for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation.

Bork, *supra* note 13, at 17.

30. *Id.* at 2 (quoting Professor Louis L. Jaffe in L. JAFFE, ENGLISH AND AMERICAN JUDGES AS LAWMAKERS 38 (1969)).

31. R. BORK, *supra* note 1, at 151.

32. *Id.*

> Anybody who has dealt extensively with law knows that a new case may seem to fall within a principle as stated and yet not fall within the rationale underlying it. As new cases present new patterns, the principle will often be restated and redefined. There is nothing wrong with that; it is, in fact, highly desirable. But the judge must be clarifying his own reasoning and verbal formulations and not trimming to arrive at results desired on grounds extraneous to the Constitution.[33]

In *Ollman v. Evans*,[34] Bork described what he believes is the proper evolution of legal doctrine. *Ollman* expanded libel protection to the media on the basis of the first amendment's guarantee of freedom of the press. Bork reasoned that "it is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[35] While judges "know very little of the precise intentions of the framers and ratifiers of the speech and press clause,"[36] they do know that the judiciary was given the responsibility to protect "the value of preserving free expression."[37] Thus, judges may properly "refine and evolve doctrine . . . so long as one is faithful to the basic meaning" of the constitutional text.[38]

> [Judges] must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions . . . . The important thing, the ultimate consideration, is the constitutional freedom that is given into [the judge's] keeping. A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.[39]

The judge's task, as understood by Bork, is to "discern how the framers' values, defined in the context of the world they knew, apply to the world we know."[40]

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33. *Id.*
34. 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).
35. *Id.* at 995.
36. *Id.* at 996.
37. *Id.*
38. *Id.*

> Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference. To say that such matters must be left to the legislature is to say that changes in circumstances must be permitted to render constitutional guarantees meaningless.

Id.

39. *Id.; see also* R. BORK, *supra* note 1, at 169 (discussion of application of old values to new circumstances to ensure that the freedoms established by the framers are protected today).
40. *Ollman*, 750 F.2d at 995.

Using Bork's interpretative method, a constitutional right of access to the courts for citizens of all economic classes and a corresponding indigent's right to legal services is possible. To establish such a right, first it must be shown that access to the courts is a principle embodied in either the text or structure of the Constitution. Second, it must be shown that the principle of court access, applied "to the world we know," requires the recognition of an indigent's right to legal services.

II. THE RIGHT TO NEUTRAL ACCESS TO THE COURTS

All citizens have a right to "neutral access" to the courts—that is, access sufficient to provide citizens a reasonable opportunity to have the law neutrally applied to them *in fact*.[41] Neutral access is, by necessity, a flexible standard because it depends upon the design of the judicial system, which changes over time. At a minimum, however, neutral access in an adversarial system requires that both parties be able to use the procedural and substantive rules necessary to present evidence and to argue the law relevant to the case. It may not require absolute equal access (that is, equal ability by both parties to manipulate procedural rules, to marshal all relevant facts, and to argue all relevant law), since the judge can balance a certain degree of inequality, but it does at least require that both sides be minimally competent to use the legal system.

The right to neutral access is a logical corollary of Bork's theory of neutral application of laws. More important, a right to neutral access can be derived from two independent constitutional sources—the due process clauses and the structure of the Constitution.

A. The Right to Neutral Access as a Corollary to the Neutral Application Requirement

As was explained in Part I, according to Bork, the neutral application of the law means that judges must apply the same principle in the same way to two different cases that cannot honestly be distinguished. If, as Bork contends, the Constitution requires that judges *apply* the law neutrally, it must be because one of the goals of the Constitution is to guarantee that individuals be *treated* neutrally in terms of the application of the laws.[42]

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41. The actual neutral application of law to an individual requires the marshalling of accurate facts and relevant law. In contrast, the merely theoretical neutral application of the law requires only a neutral judge.

42. While Bork's theory focuses on the proper exercise of judicial power, such power is not applied in a vacuum; it is applied to persons. It would make little sense if the Constitution required the neutral application of principles to resolve the Madisonian dilemma at some theoretical plane but then had no regard for whether the proper spheres of democratic authority and individual liberty were maintained in actuality. *See supra* notes 10-15.

Simply requiring that a judge apply the law neutrally guarantees only the theoretical neutral application of the law. The *actual* neutral application of the law requires two elements: a neutral judge *and* the presentation of relevant legal principles and evidence. In an adversarial system, relevant legal principles and evidence can be presented only when the law and procedural tools are readily available and usable by both parties. Since the Constitution was designed to protect rights in actuality and not simply in theory, it must require that all citizens have access to the necessary law and procedural tools needed to present a case before a court. In short, citizens must have *neutral access* to the courts.

The need for a right to neutral access can be illustrated by way of an example, based on circumstances set out in Reginald Smith's classic, *Justice and the Poor*:

> Joan and Jane each borrowed ten dollars from John in 1914, and for two years paid interest at 180 percent. In 1916 a law was enacted fixing 36 percent as the maximum rate. The lender, John, by a device contrary to statute, compelled both Joan and Jane to continue paying 156 percent interest. The law provided that if excess interest were charged, the loan would be declared void by a suit in equity.[43]

Bork's neutral application rule requires that if Joan and Jane each bring a suit against John the judge must apply the law neutrally and declare each loan void.[44] However, if the procedural tools needed to bring suit are affordable and usable by Joan but are so complicated and expensive that Jane cannot use them, Joan and Jane will not be treated neutrally. Joan can seek protection from the law while Jane, due to her inability to use the courts, is left exposed to John's illegal actions. Thus, procedural tools needed to bring suit must be made available to Jane. The constitutional goal of the actual neutral application of the law can then be seen as requiring two necessary elements: a neutral judge *and* neutral access to the courts.

It might be argued at this point that drawing a right to neutral access (access that will provide judges a reasonable opportunity to apply the law neutrally in fact) from Bork's neutral application requirement assumes too much about the intent of the framers and reads too much into Bork's theory. The right to neutral access, however, not only logically flows from Bork's neutral application requirement, it can also be demonstrated using his requirement of neutral derivation and definition of principles. The right

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43. R.H. SMITH, JUSTICE AND THE POOR 11 (1971).

44. While Bork's writings deal primarily with the interpretation and application of constitutional mandates at the appellate level, his theory has implications for statutes such as this since the issue of whether a court is legitimately exercising its constitutional authority "arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government." Bork, *supra* note 13, at 2.

to neutral access can be derived and defined from both the due process clauses and the structure of the Constitution.

B. The Right to Neutral Access Derived from the Due Process Clause

According to Bork the meaning of the words "due process" in the fifth amendment was incorporated into the fourteenth amendment due process clause.[45] This appears to be the general understanding of the clauses by both conservative and liberal theorists alike. As Professor Rubin has explained, "The extent to which the fourteenth amendment's due process clause was intended to incorporate the Bill of Rights may be disputed, but it was at least intended to incorporate the due process clause of the fifth amendment."[46] Thus, the meaning of both due process clauses can be determined by examining the intent of the framers concerning the first clause in 1791.

The term "due process of law" finds its roots in Magna Carta chapter 39[47] and chapter 40,[48] which together became chapter 29 of the Third Reissue in 1225.[49] Chapter 29 read:

> No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny or delay right or justice.[50]

As the Supreme Court explained in *Murray v. Hoboken Land and Improvement Co.*:[51]

> The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,)

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45. R. BORK, *supra* note 1, at 83 ("The framers of the fourteenth amendment adopted the due process clause of the fifth amendment . . . .").

46. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1048 (1984).

47. "No free man shall be taken, imprisoned, disseised, outlawed, or banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, 1215, 16 John, ch. 39.

48. "To no one will We sell, to none will We deny or delay, right or justice." Magna Carta, 1215, 16 John, ch. 40.

49. Chapter 29 became the standard text thereafter. *See* CONGRESSIONAL RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. no. 16, 99th Cong., 1st Sess. 1281 (1982).

50. Chapter 29, Magna Carta, Third Reissue (1225). The phrase "due process of law" initially appeared as a statutory rendition of chapter 29 in 1354 stating "no man of what Estate or Condition he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law." Magna Carta, 1354, 28 Edw. 3, ch. 3.

51. 59 U.S. (18 How.) 272 (1855).

> says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.[52]

In the Magna Carta, the expression "law of the land" bound the Crown not to take rights from individuals without fair legal procedures, including notice, a hearing, and judgment.[53] In the United States, the due process clauses limit the legislative, executive, and judicial powers of government.[54] In Bork's view, the due process clause "was designed only to require fair procedures in implementing laws."[55] "The framers of the fourteenth amendment adopted the due process clause of the fifth amendment but thought it necessary to add the equal protection clause, obviously understanding that *due process, the requirement of fair procedures,* did not include the requirement of equal protection in the substance of state laws."[56] Thus, according to the original understanding, the core value that the due process clauses were designed to protect was fair procedure.

How then was this core value of fair procedure *defined* by the founders of the Constitution and, particularly concerning court access, what constituted a "fair" hearing? Answering this question requires an examination of the development of the English and early American judicial systems. In England, the concept of a fair hearing reflected a concern that the benefits

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52. *Id.* at 276.

53. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment,* 18 CALIF. L. REV. 483, 586 (1930); *see also* Burns, *Due Process of Law: After 1890 Anything; Today Everything—A Bicentennial Proposal to Restore Its Original Meaning,* 35 DE PAUL L. REV. 773, 780 (1986) (discussing the interpretation of this notion of due process expressed in the Magna Carta by the seventeenth century English jurist Sir Edward Coke).

54. The due process clause in the Bill of Rights does not require simply that the process be in conformity with statutes enacted by legislative bodies. As the Court in *Murray* explained:

> That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress [sic] free to make any process "due process of law," by its mere will.

59 U.S. (18 How.) at 276.

55. R. BORK, *supra* note 1, at 43. Wechsler takes a similar position. "Even 'due process,' on the other hand, might have been confined, as Mr. Justice Brandeis urged originally, to a guarantee of fair procedure . . . the analogue for us of what the barons meant in Magna Carta." H. WECHSLER, *supra* note 15, at 26 (footnote omitted).

56. R. BORK, *supra* note 1, at 83 (emphasis added).

of the judicial system be available to all citizens, regardless of wealth. Hence, the words in chapter 29 of the Third Reissue state: "[t]o no one will we sell, to no one will we deny or delay right or justice."[57] The legal needs of those unable to afford counsel were met through special tribunals and by providing legal assistance to indigents appearing in regular courts.[58] The suit in forma pauperis permitted actions in the regular courts without payment of prohibitive court costs. Over time, in view of the widespread use of counsel, this writ came to include the provision of counsel for indigent litigants. In 1495 the practice was codified in a statute providing for assigned attorneys to prepare and handle cases for indigent parties:

> [E]very poor person or persons which have or hereafter shall have causes of action against any person within this realm shall have by the discretion of the Chancellor of this realm, for the time being, writs or writs original, and subpoenas according to the nature of their causes, therefor nothing paying to your Highness for the seals of the same, nor to any person for the writing of the said writs to be hereafter sued; and that the said Chancellor shall assign clerks to write the same writs ready to be sealed; and also learned counsel and attorneys . . . for such poor person or persons and all other officers requisite and necessary to be had for the speed of the said suits, which shall do their duties without any reward for their counsels, and the same law shall be observed of his Common Pleas, and barons of his Exchequer, and all other justices in the courts of record where any such suit shall be.[59]

Despite these efforts to see that the judicial system was available to all persons of the realm, the English system was far from perfect. Until 1836, England engaged in the enigmatic practice of allowing accused criminals to retain counsel in less serious crimes while denying representation to alleged felons, whatever their economic status.[60] In addition, the English legal machinery was slow, cumbersome, and complicated. The in forma pauperis legislation contained no administrative guidance.[61] As a result, in practice

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57. Magna Carta, Chapter 29, Third Reissue (1225).

58. Special tribunals designed to meet the needs of poor persons included the General Eyre, the Chancery, the Star Chamber, the Court of Requests, and later on, the county courts. For a description of these admirable yet imperfect attempts to meet the legal needs of the poor in England, see Maguire, *Poverty and Civil Litigation,* 36 HARV. L. REV. 361 (1923).

59. 2 Hen. 7, ch. 12 (1495), *reprinted in* I. CALLISON, COURTS OF INJUSTICE 595 (1956).

60. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-9 (1955); *see also* Note, *The Right To Counsel in Civil Litigation,* 66 COLUM. L. REV. 1322 (1966). "The supposedly neutral position of the judge and his ability to protect the defendant served as the dubious excuses for denying counsel in felony trials." To ensure the abolition of the this practice] the sixth amendment was enacted" *Id.* at 1327 (footnotes omitted). Given this incongruous practice in England, it is no wonder that the framers pushed for the specific inclusion of such a right in the Bill of Rights. Contrary to current Supreme Court doctrine, however, the sixth amendment was not originally intended to guarantee indigents a right to state-appointed counsel. Instead, as Professor Wechsler points out, it provided simply "a right to defend by counsel if you [had] one, contrary to what was then the English law." H. WECHSLER, *supra* note 15, at 18 (footnote omitted).

61. Maguire, *supra* note 58, at 378.

the act became susceptible to abuse. Judge-made rules designed to avoid these abuses stripped the legislation of much of its designed positive impact.[62] Despite its failings in practice, however, the enactment of the in forma pauperis statute demonstrates the English conviction that fair procedure required that all citizens, regardless of economic status, should have the ability to use the procedural and substantive rules necessary to present relevant evidence and legal doctrine to a court.

In the United States, the conviction that the judicial system should be usable by all citizens was stronger. Statutes existed in many of the colonies mandating equal treatment for all, regardless of wealth.[63] Nearly every state constitution contained sections providing generally that every person ought to have a certain remedy at law for all injuries to person, property, or character and that justice be available without delay.[64] For example, Article IX, Section II of the Constitution of Pennsylvania, enacted in 1790, stated, "All courts shall be open and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law; and right and justice administered without sale, denial or delay."[65]

At the same time, members of the new nation held strong convictions that retention of a lawyer was not required to obtain a fair hearing. In England, the need for lawyers had arisen primarily because of the development of rigid and technical rules. In the American colonies the situation was vastly different.[66] The early American trial often resembled deliberation of the community on justice or injustice, and equitable principles rather than legal precedent were the basis for decision.[67] Notably, most early presiding judges were laypeople rather than lawyers.[68] Public resistance to

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62. *Id.* at 376-78.

63. *See* Reinsch, *The English Common Law in the Early American Colonies*, in 1 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY 367, 404-05 (1907).

64. F. STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 148-49 (1908) (citing the state constitutions). The clauses of the various state constitutions used terms such as "without sale, denial or delay;" "prejudice;" "due course of law;" "promptly and without delay;" "by due course of law, without sale, denial or delay;" "due process of law;" "by the law of the land;" or "the judgment of his peers." *Id.* at 149, 169-70 (footnotes omitted). The Massachusetts Declaration of Rights XI (1780) stated:

> [e]very subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it;—completely, and without any denial;—promptly, and without delay;—conformably to the laws.

Id. at 80.

65. *See* I. CALLISON, *supra* note 59, at 591.

66. *See* Note, *supra* note 60, at 1328. Both substantive and procedural law were characterized by the "greatest laxity and informality." Reinsch, *supra* note 63, at 411.

67. Note, *supra* note 60, at 1328.

68. This situation occurred because

> the technical knowledge of the lawyer was not in demand . . . . [T]he lawyers had to turn their hands to semi-professional or non-professional work, the courts

the notion that access to lawyers was essential for a fair hearing continued well into the late eighteenth century. This conviction was based in large part on a general hostility toward the legal profession. For example, Benjamin Austin, a highly influential Anti-Federalist, wrote in 1786,

> Why this intervening order? The law and evidence are all the essentials required, and are not the judges with the jury competent for these purposes? . . .
> . . . There is a danger of lawyers becoming formidable as a combined body. The people should be guarded against it as it might subvert every principle of law and establish a perfect aristocracy.[69]

Thus, rather than replicate the clumsy in forma pauperis statute to ensure that all citizens could retain counsel, many persons pushed for legal systems that could be understood and thus used by all without the retention of counsel.[70] With legal rules understandable to the layperson, thereby eliminating the major expense of litigation, it was hoped that all citizens would have effective access to the courts.[71]

This review of the American judicial system during the time leading up to and surrounding the enactment of the fifth amendment due process clause demonstrates the common public conviction that the value of fair procedure (while not requiring retained counsel) included the concept that all citizens,

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> of the colonies at that date having no need of the aid of trained profession to discover what was the law, as by the custom of the time the law was in so many cases determined by the discretion of the court.

Reinsch, *supra* note 63, at 412; *see also infra* note 71 (discussion of costs incident to litigation).

69. C. WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 191 (1970); *see also* F. AUMANN, THE CHANGING AMERICAN LEGAL SYSTEM; SOME SELECTED PHASES 19 (1940) (discussing the restrictive legislation regarding lawyers in this period).

70. In several jurisdictions, lay judges presided in the courts long beyond the revolutionary period. F. AUMANN, *supra* note 69, at 38. In New Hampshire, farmers, merchants, and ministers served as state supreme court justices in the post-Revolutionary period. In Rhode Island, a blacksmith was judge of the highest court from 1814 to 1818, and from 1818 to 1826 the chief justice was a farmer. *Id.* In 1803-1806, a series of statutes was passed in Pennsylvania creating an elaborate machinery by which a party having a claim or debt might file a statement in court, the other party might file an answer in informal shape, and thereupon the case would proceed to judgment without the intervention of counsel.

Three states—Massachusetts, South Carolina, and Virginia—did have in forma pauperis statutes prior to the enactment of the Bill of Rights. A handful of other states enacted statutes later on: Kentucky (1798), New Jersey (1799), New York (1801), and the Louisiana Territory (1807). Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases,* VALP. L. REV. 21, 29; *see also* Maguire, *supra* note 58, at 381 (discussing the Massachusetts in forma pauperis statute).

71. Costs incident to litigation other than for counsel were low. Maguire, *supra* note 58, at 382. In the rare instances where a litigant could not afford even these costs, the courts had their inherent power to waive these fees. *See* R.H. SMITH, *supra* note 43, at 100-02. In addition, almost universally courts were given discretion as to the award of costs in equity. *See* Maguire, *supra* note 58, at 382 n.105 (noting, however, that such discretion may not have extended to the remission of fees).

regardless of economic status, must have the ability to present the necessary evidence and the legal doctrine to the court. In other words, the value of fair procedure embodied in the due process clause gave citizens a right to *neutral access* to the courts, access that would give a judge reasonable opportunity to apply the law neutrally in fact.

C. The Right to Neutral Access Derived from Constitutionally Established Government Procedures

The right to neutral access can be independently established through the derivation of what Robert Bork calls "secondary" rights.[72] In deriving a "secondary" right to neutral access to the courts, the determinative question is whether that right is needed to preserve the governmental process established by the Constitution.[73]

The American republican system was justified primarily by the argument that the legislature and executive could not be entrusted with the enforcement of rights.[74] Hamilton's argument in *The Federalist* is that use of the courts is essential to protect individual rights.[75] He wrote of "[t]hat inflexible and uniform adherence to the rights . . . of individuals, which we perceive to be indispensable in the courts of justice," arguing for the courts' role in "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled."[76]

Since only the judiciary can be relied on to protect rights, all individuals must have access to the courts. The risk of deforming the governmental process by denying court access on the basis of economic status was recognized by Reginald Heber Smith, the founder of the legal aid movement in the United States:

> For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgment of the fundamental rights which the State is directly forbidden to infringe. To deny law or justice to any person is, in actual effect, to outlaw them by stripping them of their only protection.
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> . . . .
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> Differences in the ability of classes to use the machinery of the law, if permitted to remain, lead inevitably to disparity between the rights of

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72. *See supra* notes 25-32 and accompanying text.
73. *Supra* note 22-25 and accompanying text.
74. D. LUBAN, LAWYERS AND JUSTICE 254 (1988).
75. THE FEDERALIST No. 78 (A. Hamilton):
> The independence of judges is . . . requisite to guard . . . the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves . . . [including] the injury of the private rights of particular classes of citizens, by unjust and partial laws.

76. THE FEDERALIST No. 80 (A. Hamilton).

> classes in the law itself. And when the law recognizes and enforces a distinction between classes, revolution ensues or democracy is at an end.[77]

It was this very rationale that the Supreme Court used to decide *Boddie v. Connecticut*.[78] In *Boddie* the Court struck down filing fees for divorce courts on the ground that such fees excluded poor people from the courts and thus violated their due process rights under the fourteenth amendment. While the Court grounded its decision in the due process clause, its reasoning was more consistent with Bork's theory of the derivation of "secondary" rights.[79] The Court reasoned that the filing fee stripped poor citizens of access to the legal system, deforming the system of government established by the Constitution:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible . . . . Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."[80]

Justice Harlan argued for the majority that since America "bottoms its systematic definition of individual rights and duties" on the courts, "without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be . . . acceptable under [the United States' constitutional] scheme."[81]

The Court explicitly refrained, however, from finding a right of universal access to the courts.[82] Instead, the Court drew two distinctions between

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77. R. H. SMITH, *supra* note 43, at 5, 12.

78. 401 U.S. 371 (1971).

79. Professor Ralph Winter has suggested that the *Boddie* decision could be justified under Bork's theory of secondary rights. *See* Winter, *Poverty, Economic Equality, and The Equal Protection Clause,* 1972 SUP. CT. REV. 41, 60-61.

80. *Boddie,* 401 U.S. at 374.

81. *Id.* at 375.

82. Harlan wrote:

> We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship.

Id. at 382-83. While legal aid supporters have long argued that an individual has a constitutional right to legal services in civil cases, the courts have consistently rejected that right except under special circumstances. *See* Breger, *Legal Aid For the Poor: A Conceptual Analysis,* 60 N.C.L. REV. 282, 290 (1982). *Boddie* has been construed narrowly. *See* Ortwein v. Schwab, 410 U.S. 456 (1973); United States v. Kraus, 409 U.S. 434 (1973). Other lines of reasoning have also been unpersuasive to the Court. *See* Lassiter v. Department of Social Services of Durham, 452 U.S. 18 (1981); Argersinger v. Hamlin, 407 U.S. 25 (1972) (due process rationale); Ross v. Moffitt, 417 U.S. 600 (1974); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956) (equal protection rationale).

divorce and other disputes in an effort to limit the opinion. The Court said that open access to the courts was only required where the dispute involves the "adjustment of a fundamental human relationship" and the courts are the "exclusive" means of resolving the dispute.[83]

While the "theoretical framework" from which the Court reasons in *Boddie* is fully consistent with the theory of original understanding, the rule established from that framework is not. The rule applies only where access to the court "is the exclusive precondition to the adjustment of a fundamental human relationship."[84] This limitation cannot be reconciled with Bork's theory of original understanding. The only principled rule based upon the framework set up by the Court was to recognize a universal right to court access for all citizens.

Indeed, this was how Justice Black understood *Boddie.* In the same term that *Boddie* was written, the Court considered certiorari in eight cases in which indigents were denied court access due to their poverty.[85] In an unusual dissent to the denial of certiorari in one of these cases, Justice Black[86] argued that under *Boddie* no citizen could be denied access to civil courts because of an inability to pay legal fees or hire counsel:

> In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.[87]

He then went on to criticize the limitations set out in *Boddie.*

First, Justice Black showed that the "exclusiveness" of the judicial process as a remedy is no limitation at all since "[t]he States and Federal Government hold the ultimate power of enforcement in almost every dispute."[88] In American society private forms of dispute resolution do exist, but to be effective these techniques must be backed by recourse to legal authority.[89]

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83. *Boddie,* 401 U.S. at 383.

84. *Id.* at 382-83.

85. The Court denied certiorari in five of the cases: *In re* Garland, 402 U.S. 966 (1970); Bourbeau v. Lancaster, 402 U.S. 964 (1970); Kaufman v. Carter, 402 U.S. 964 (1970); Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1970); Beverly v. Scotland Urban Enter., Inc., 402 U.S. 936 (1970). Two were vacated and remanded for reconsideration in light of *Boddie*: Sloatman v. Gibbons, 402 U.S. 939 (1970); Frederick v. Schwartz, 402 U.S. 937 (1970). In only one case did the Court note probable jurisdiction: Lindsey v. Normet, 402 U.S. 941 (1970). The issue was subsequently resolved by Lindsey v. Normet, 405 U.S. 56 (1971).

86. Justice Black dissented in *Boddie,* 401 U.S. at 389.

87. *Meltzer,* 402 U.S. at 955 (Black, J., dissenting).

88. *Id.* at 956.

89. Black reasoned:

> Every law student learns in the first semester of law school that property, for instance, is "valuable" only because the State will enforce the collection of rights

Only through the potential recourse of state-approved adjudication can citizens ensure themselves of the protection of the law.[90] Because individuals living in a democratic society must exchange recourse to self-help for legal protection,[91] they must be provided the opportunity to use the courts effectively to resolve disputes.[92]

The other limitation on *Boddie*—that the dispute concerns a "fundamental right"—conflicts with the Court's reasoning that the law protects interests that are fundamental to the citizenry, not merely those that are fundamental in the Constitution.[93] Thus, as Justice Black pointed out, no fair distinction can be drawn between the right to divorce and other rights.[94] Moreover, this "fundamental rights" doctrine used in *Boddie* and other Supreme Court opinions is, according to Bork, "unconnected with either the Constitution or its history."[95] Thus, under the theory of original understanding the limitation of "fundamental rights" is no limitation at all.

As *Boddie* demonstrates, a right to neutral access can be derived from the governmental processes established by the Constitution. To allow the State to erect a legal system that prevents a large segment of society from obtaining access to the courts deforms the Madisonian form of government,

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> that attach to its ownership. Thus, the State holds the ultimate remedy in almost every property dispute. Similarly, the wrong that gives rise to a right of damages in tort exists only because society's lawmakers have created a standard of care and a duty to abide by that standard. The alternatives to resort to the judicial process in tort cases are negotiation and settlement, abandonment of recovery, private self-help, and perhaps insurance. With the exception of insurance, the alternatives are exactly the same as in a divorce case—negotiate a separation agreement, decide to continue the marriage relationship, or violate the law. Likewise, contracts are valuable only because society will enforce them. Indeed, marriage itself when analyzed in purely legal terms is a contract that cannot be revoked without governmental approval. Thus, the judicial process is the exclusive means through which almost any dispute can ultimately be resolved short of brute force.

Id. at 956-57 (footnote omitted).

90. As Frank Michelman points out, the argument about alternative dispute resolution fairly passeth understanding . . . . An indigent insolvent person, for example, has alternative avenues to relief from debts only on the assumption that his creditors are not unyielding. But why should they yield, since he is indigent and, by holding out, they cannot get less than they would get out of bankruptcy?

Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I,* 1973 DUKE L.J. 1153, 1179.

91. *See, e.g.,* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT (3rd ed. 1966).

92. Breger, *supra* note 82, at 288.

93. *See* D. LUBAN, *supra* note 74, at 259.

94. "I cannot believe that my Brethren would find the rights of a man with both legs cut off by a negligent railroad less 'fundamental' than a person's right to seek a divorce." *Meltzer,* 402 U.S. at 958.

95. *See* Bork, *supra* note 24.

creating, in effect, an aristocracy where some citizens can enforce their rights and others cannot.[96]

The neutral access principle is therefore firmly established in the Constitution. Not only does the principle logically flow from Bork's neutral application requirement, but it can also be derived and defined from both the due process clauses and the overall structure of the Constitution. For a judge to remain principled, to hold to the original understanding of the Constitution and not become a "naked power organ," the judge must derive principles that will protect the right to court access for all citizens, including the poor.

III. Neutral Application of the Right to Neutral Access: The Indigent's Right to Legal Services

How then shall this right to neutral access be applied to the issue of indigent access to the courts in today's world? That is, how does the right

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96. The famous case of Griffin v. Illinois, 351 U.S. 12, *reh'g denied,* 351 U.S. 958 (1956) (indigent defendant entitled to a free transcript to prepare his appeal), prompted commentary that justified the right on the grounds of the indigent's right to participate in society. Wilcox & Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment,* 43 Cornell L.Q. 1, 16-17 (1957). Deriving the right to access from the governmental processes of the Constitution answers challenges based on the following argument:

> [The poor man is] doubtlessly deprived of many things besides [access to the courts]; proper medical care, for instance. Would anyone argue that [the state] owes a constitutional duty to provide medical care to the poor? If not, how can anyone argue that it owes a constitutional duty to provide a type of access to the courts?
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> [The answer is that access to the courts is] not of the same order, in our theory of government, as basic medical services. The provision of applied justice is an essential function of the state even under the most conservative political theory. It is of the essence of citizenship that a person have access to the state's legal institutions. Without this he is without full citizenship; he is a helpless victim of the government's monopoly of force. . . .
>
> We cannot conceive of a man as truly a citizen if he is too poor to have access to the courts. We can, however, conceive of him as truly a citizen if he is too poor to receive adequate medical care.
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> A state which provides its citizens with medical care we term a welfare state. It has *extended* the role of government to provide for the social welfare of its people. And if we dislike welfare states, we may repeat the adage that "that government is best which governs least."
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> But a state which does no more than to provide *all* its citizens with applied justice is *not* extending the role of government to novel fields but rather only giving all men that which is the most basic function of government, the provision of legal process.
>
> . . . .
>
> . . . Contrary to [some suggestions], there is no contradiction in holding it unconstitutional to require money from the poor for legal services while holding it constitutional to require money from them for educational or medical services. These last are services of a different order. Access to the processes of law is embedded in our constitution and in every democratic constitution, as a necessary element in the relationship between the citizen and his government.

Id. (emphasis in original).

to neutral access that has been derived and "defined in the context of the world [the framers] knew, apply to the world we know?"[97] To prove a violation of the right to neutral access an indigent should establish: (1) that he or she was denied neutral access to the courts and (2) that the denial was a result of state action.

A. The Necessity of Legal Services for Neutral Access

Neutral access is access to the legal system that provides a judge a reasonable opportunity to apply the law neutrally in fact. At a minimum, in an adversarial system, neutral access requires that both parties have the ability to use the procedural and substantive law necessary to present evidence and legal doctrine relevant to the case before the court. Neutral access thus requires that each party possess at least minimal competence to use the legal system.[98]

While access to legal counsel and other legal services may have been unnecessary to achieve minimal competence in the courts at the time the Constitution was written, there is little question that such access is needed to utilize today's complex judicial machinery. The simple fact is that today a right of access to the courts is meaningless without access to the services of lawyers. Our legal institutions are designed to be operated by lawyers, not laypersons.[99] Statutes and judicial decisions are written in such a way that they are fully intelligible only to the legally trained. As one commentator puts it:

> Because of the complexity of litigation in modern courts, laymen are incapable of effective and thorough advocacy of their claims. Our judicial system is inundated with technicalities of procedures and nuances of law which present incomprehensible barriers to laymen who seek access to the courts. Our courts do not dispense justice with the simplistic fairness of Solomon; under our system of laws, justice is as often dependent upon the manipulation of complex procedures and symbols as it is on the merits of a cause . . . . As a result, it is not surprising that the layman who is unaided by the legal specialist is often lost within our judicial system, for he lacks the skills which are necessary to effectively advocate his position. Consequently, access to the legal process, to courts and to justice itself is dependent upon "the guiding hand of counsel."[100]

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97. R. BORK, *supra* note 1, at 168.

98. D. Lubin, *supra* note 74, at 246.

99. The one exception to this is small claims court. *See, e.g.*, IND. CODE § 33-11.6-4-6 (1988).

100. Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U. L. REV. 595, 617-18 (1973) (footnote omitted) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)) (holding that defendants had a right to counsel in capital cases under the due process clause).

The necessity of access to legal services to obtain neutral access to the courts is readily apparent when one considers a poor person attempting to represent himself or herself. Suppose, for example, a poor person actually had the educational level and the time to read and understand the applicable legal texts. Suppose further that "[he or] she understood the principle of stare decisis, had the knack of 'thinking like a lawyer,' developed a taste for Byzantine reasoning, logic chopping, and casuistry."[101] Even so, without a basic grasp of procedural and evidentiary tactics as well as access to physical resources such as typewriters and photocopy machines, "[t]he inescapable conclusion is that her supposed access to the legal system, based on the bare fact that no regulations forbid her from self-representation, is nothing but a joke."[102]

The response to the above argument is that a poor person's inability to obtain legal services is not the fault of the legal system. Instead it is the fault of the economic system that allows poverty to exist. One could further argue that the state cannot be held responsible for failing to make up the gap.[103] This objection, however, is based on the false premise that the state has not blocked poor people from obtaining access to the legal system. The state has erected numerous barriers that effectively strip indigents of their right to neutral access to the courts.

B. State Action Denying Neutral Access

State decisions have resulted in a legal system that laypeople cannot operate. Over the years, state decisions have brought the American legal system from a point where it was used and operated by laymen to a system "inundated with technicalities of procedure and nuances of law which present incomprehensible barriers to laymen who seek access to the courts."[104]

The inability of some citizens to afford lawyers is also the result of choices made by the state. The state has in large part delegated attorneys' fees regulation to the state bar associations.[105] State courts, in addition to

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101. D. LUBAN, *supra* note 74, at 245.

102. *Id.*

103. See Wilcox & Bloustein, *supra* note 96, at 15-17, for a discussion of the invalidity of the premise "that the state owes its citizens no more than to make justice *available* to them [if they can afford it]." *Id.*

104. Brickman, *supra* note 100, at 617-18; *see also* D. LUBAN, *supra* note 74, at 246 (discussing the impact of state regulations of attorney fees and unauthorized practice of law on poor laypeople); Grey, Note, *The Indigent's Right to Counsel in Civil Cases,* 76 YALE L.J. 545, 556 (1967).

105. This regulation, in turn, is enforced by the highest court in each state. D. LUBAN, *supra* note 74, at 246. "Bar association-imposed restrictions on access involve state action within the meaning of the fourteenth amendment." Brickman, *supra* note 100, at 642 n.254 (citing Lewis, *The Meaning of State Action,* 60 COLUM. L. REV. 1083 (1960); Note, *Exclusions from Private Associations,* 74 YALE L.J. 1313, 1319-21 (1965)).

enforcing these regulations (*i.e.*, the Model Code[106] and Model Rules[107]), regulate attorneys' fees directly through actions such as striking down excessive fees.[108] Perhaps the most direct state action affecting a poor person's access to legal services comes from the state court's power to appoint counsel in certain cases and to deny compensation to appointed counsel if budgets do not permit compensation.[109]

Regulation of the unauthorized practice of law has also worked to price legal services beyond the reach of much of the public.[110] In thirty-seven jurisdictions it is a misdemeanor for a nonlawyer to practice law, and in seven other jurisdictions courts can cite unauthorized practitioners for contempt.[111] These restrictions on the practice of law create a professional monopoly guaranteeing an inflated level of lawyers' fees and limiting access to the legal system.[112]

The state, therefore, has erected numerous barriers to court access in violation of a poor citizen's right to neutral access to the courts.[113] This

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106. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

107. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

108. "[C]ourts are often willing to strike down attorneys' fees if they are too high, as in treble-damage private antitrust class actions." D. LUBAN, *supra* note 74, at 246.

109. *See id.*

110. *See* Brickman, *supra* note 100, at 642; D. LUBAN, *supra* note 74, at 246.

111. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Prohibitions*, 34 STAN. L. REV. 1, 11 (1981) [hereinafter Rhode, *Policing the Professional Monopoly*]; D. LUBAN, *supra* note 74, at 246. *See generally* Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990) [hereinafer Rhode, *Non-Lawyer Practice*].

112. D. LUBAN, *supra* note 74, at 246-47. "The controls exercised by the bar acting on behalf of the state, or directly by the state, over who may engage in the practice of law, in turn enable lawyers to maintain high fee schedules. . . . Simply stated, it is the unauthorized-practice regulations that have the principal impact on the price of legal services, and it is price that controls access." Brickman, *supra* note 100, at 662 (footnote omitted); *see also* F. MARKS, THE LEGAL NEEDS OF THE POOR: A CRITICAL ANALYSIS 2 (1971). Clark Durant, former head of the Legal Services Corporation, held the view that "[t]he greatest barrier to widely dispersed, low cost dispute resolution for the poor, and for all people, could well be the laws protecting our profession [from competition]." Rhode, *Non-Lawyer Practice*, *supra* note 111, at 218-19 (quoting Durant's 1987 speech to the ABA Board of Governors).

The official rationale for unauthorized practice regulations is to protect consumers. Rhode, *Non-Lawyer Practice*, *supra* note 111, at 209; *see also* D. LUBAN, *supra* note 74, at 247. A study conducted in 1979, however, indicated that unauthorized practice regulations elevate legal fees without serving any other significant public interest. *See* Rhode, *Policing the Professional Monopoly*, *supra* note 111, at 97-99.

113. This selective exclusion of the poor from the legal system not only fails to confer an advantage on them—it actively injures them as well. As Professor Luban explains, the legal system does more than protect people from each other:

> [A] legal system . . . enormously expands our field of action, allowing us to do things that we couldn't have done otherwise—to draft wills, adopt children, make contracts, limit liability. As people utilize these features of the system, a network of practices—of power and privilege—is set up from which those who have no access to the system are excluded; and this exclusion itself intensifies the pariah status of the poor. It is hard to avoid the conclusion that the state has conferred

violation has created an improper balance between the spheres of majority rule and individual liberty. The Court, as guardian of the Constitution and the individual rights it guarantees, must correct that imbalance. The only realistic rule that can do so under our current judicial system is to recognize an indigent's right to legal services.

CONCLUSION

As Bork emphasizes, "Judges must never hesitate to apply old values to new circumstances, whether those circumstances spring from changes in technology or changes in the impact of traditional common law actions."[114] Considering the changes in our judicial system over the last two hundred years, the recognition of an indigent's right to legal services is a legitimate and logical evolution of the neutral access principle.

The judge's duty in the context of an indigent's access to the courts is to ensure that the neutral access principle established by the framers is "made effective in today's altered world."[115] Given today's judicial system, application of that principle should require the recognition of an indigent's right to legal services. Only then can the Court hope to retain its legitimacy before the more vulnerable citizens of our country. Only then can the Court protect the powers and freedoms the framers sought to guarantee to all citizens regardless of their economic status in society.

> the advantages of the legal system on those who can afford to use it and built it on the backs of those who cannot.

D. LUBAN, *supra* note 74, at 247.

114. R. BORK, *supra* note 1, at 169 (quoting Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring)).

115. *Id.*